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# Supreme Court of the United States

OCTOBER TERM, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,
*Petitioner,*

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF COUNCIL ON RELIGIOUS FREEDOM, MICHIGAN ASSOCIATION OF CHRISTIAN SCHOOLS, INC., WEIMAR INSTITUTE, INC., AND OUTPOST CENTERS, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST OF AMICI CURIAE

Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by government which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom.

The Council is a membership organization with dues paying members located throughout the United States. The board of directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion to the greatest extent permissible in a complex society, whether that interference be from the executive, legislative, or judicial branches of government.

The Michigan Association of Christian Schools, Inc. is a nonprofit corporation which includes approximately 60 Christian schools as members. Some of those schools are not church-operated, managed, or controlled. Each of the schools requires its teaching staff to adhere to Christian beliefs and practices.

Weimar Institute is an independent organization of individual Seventh-day Adventists who are dedicated to the operational propagation of holistic Christian living. It is committed to support the ministry of the

Seventh-day Adventist Church. It operates a training school at Weimar, California.

Weimar Institute does not discriminate in employment because of race, color, sex, age, national origin or handicap. However, as a nonprofit organization owned and operated by individuals who are Seventh-day Adventists for the express purpose of fulfilling the unique mission given to the Seventh-day Adventist Church, Weimar Institute reserves the right to restrict its hiring to members in good standing of the Seventh-day Adventist Church who have a sincere concern for the spiritual, moral, social, educational and health principles and practices as expressed by the Institute.

Outpost Centers, Inc. ("OCI") is composed of 90 nonprofit member organizations in 27 countries of the world. OCI is not owned or operated by the Seventh-day Adventist Church. But its board is composed exclusively of individuals who are members of the Seventh-day Adventist denomination. Among the member organizations are three secondary schools located within the United States: Laurelwood Academy located in Gaston, Oregon; Castle Valley Academy located at Moab, Utah; and Laurelbrook Academy located at Dayton, Tennessee. Another member organization, Country Life Vocational School located at Portage, Wisconsin, provides vocational training for secondary students. In addition, there are five member organizations within OCI operating as adult training schools. These include Eden Valley Institute located at Loveland, Colorado; Wildwood Institute located at Wildwood, Georgia; Living Springs Retreat located at Putnam Valley, New York; Uchee Pines

located at Scale, Alabama; and Poland Spring Health Institute located at Poland Spring, Maine.

Each of the member organizations of OCI works in harmony with the teachings of the Seventh-day Adventist Church. All board members and employees are required to be members in good standing of the Seventh-day Adventist Church.

## SUMMARY OF ARGUMENT

The Ninth Circuit has narrowly construed the section 702 exemption for religious educational organizations. In determining whether such an institution qualifies for this exemption allowing it to discriminate in hiring on the basis of religion, the Ninth Circuit gives considerable weight to whether the institution is owned, supported, controlled, or managed by an organized church.

It is the staff of such an educational institution that is the major contributing factor to the school's religious atmosphere. And it is the staff which has the greatest impact on the student body. The Ninth Circuit's interpretation of section 702, however, interferes with the inherent right of the religious educational institution to determine how it will inculcate religious values.

The court of appeals recognized that religious instruction provided at Kamehameha Schools was provided by religious education teachers and that boarding students were required to attend services at the Bishop Memorial Church. The fact that the schools did not choose to adopt a hard sell approach to religious education should not prevent Kamehameha

Schools from teaching religion through the use of Protestant role models.

The Ninth Circuit's approach will result in judicial evaluation of the degree of religiosity found in the schools with fine line-drawing resulting in the type of entanglement which this Court has sought to avoid.

Clearly, the religious program of the Kamehameha Schools is sufficiently religious to prohibit direct governmental aid to the schools. If Kamehameha Schools are prohibited from receiving direct government grants because of their religious atmosphere and conduct within the schools, the government should be barred from imposing itself into school staffing and dismissal matters.

A narrow interpretation of section 702 requires a case-by-case evaluation of each non-church operated school with each institution being a potential target of a discrimination claim. Because there is a split in the circuits concerning whether the exemption proviso should be narrowly or broadly construed, and hundreds of educational institutions are now at risk, this Court should grant the writ of certiorari and settle the question.

## ARGUMENT

### THE NARROW INTERPRETATION BY THE NINTH CIRCUIT OF THE EXEMPTION FOR RELIGIOUS EDUCATIONAL INSTITUTIONS SET FORTH IN SECTION 702 OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, THREATENS THE RELIGIOUS AUTONOMY OF RELIGIOUS EDUCATIONAL INSTITUTIONS OPERATED BY NON-CHURCH ORGANIZATIONS.

The Ninth Circuit essentially ruled that the section 702 exemption for religious educational institutions,

as set forth in 42 U.S.C. § 2000e-1(a), must be narrowly construed. *EEOC v. Kamehameha Schools/ Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993); App. 5a.[1] In determining whether a religious educational institution qualifies for a section 702 exemption permitting it to discriminate in hiring on the basis of religion, the Ninth Circuit gives considerable weight to whether the educational institution was ever owned, supported, controlled, or managed in whole or significant part by a religious denomination. *See Kamehameha*, 990 F.2d at 461 n.7; App. 7a n.7.[2]

Neither amicus Weimar Institute, Inc. nor the educational institutions operated by member organizations of amicus Outpost Centers, Inc. are owned, supported, controlled or managed in whole or in significant part by the Seventh-day Adventist Church or any other religious denomination. Likewise, some of the schools that are members of Michigan Association of Christian Schools are not church-owned and/or -

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[1] References to the Appendix "App. 00a" are to the Appendix appearing in the Petition for a Writ of Certiorari filed by petitioner.

[2] The Ninth Circuit, citing *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 617 (9th Cir. 1988), agreed with the EEOC that section 2000e-1(a) does not exempt an organization that is "merely 'affiliated' with a religious organization." It also concluded "that only those institutions with extremely close ties to organized religion would be covered. Churches, and entities similar to churches, were the paradigm. *Id.* at 618." *Kamehameha*, 990 F.2d at 460; App. 5a. EEOC, in its Determination applying *Townley*, concluded that Kamehameha was not exempt under section 702 even though it stated that "[i]t is clear from the evidence submitted during the investigation . . . that the schools have a religious orientation that is similar to that found in most church-schools." App. 52a at n.8.

operated. Nevertheless, all of these educational institutions seek to project a religious influence through a selection of staff based upon their individual membership in and commitment to the beliefs and teachings of their particular faiths.

Amici believe that the religious atmosphere of an educational institution is in major part determined by its teachers and other personnel. This concept was clearly articulated by a Catholic School official who wrote:

> Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing called atmosphere. It comes not from the physical facilities, or the religious classes, or the students—at least not chiefly. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty—even more important than the religion classes themselves to the totality of curriculum . . . .
>
> When the student comes to the Catholic school, he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible, is the spirit created by the common Christian life conscientiously lived by the faculty and participated in by the students.

J. Leibrecht, *Thoughts on the Catholic School*, The Catholic Educator 27, 28, 33 (May, 1966).

Professor Donald A. Giannella expressed a view similar to that embraced in this Court's decision in *Meek v. Pittenger*, 421 U.S. 349 (1975):

> [A]s a recent study of Catholic parochial education points out [Notre Dame Report, Catholic Schools in Action, 17 (R. Neuwien ed. 1966)]: "the very presence of the religious [teachers and administrators] is in itself a dominant, unforgettable symbol." This pervasive atmosphere makes on the young student's mind a lasting imprint that the holy intranscendental should be central to all facets of life. It increases respect for the church as an institution to guide one's total life adjustments and undoubtedly helps stimulate interest in religious vocations.
>
> In short, the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity entails some support of the disqualifying religious function of molding the religious personality of the young student.

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 574 (1968).

To many educational institutions, it is the selection criteria for the staff that has the greatest impact on the students. Certainly, the character of the school is determined more by the faculty of the school than

by a formalistic determination focused upon the school's ownership. At Kamehameha Schools, the established plan was to teach Protestant religious values by daily contact through the use of Protestant role models. App. 31a-32a, 37a.

Justice Douglas in *Lemon v. Kurtzman*, 403 U.S. 602, 630-31 (1971), recognized that sectarian education may involve indoctrination of religious teachings either "delicately and indirectly, or massively through doctrinal courses." The Ninth Circuit's determination that a section 702 exemption in the hiring of teaching staff hinges, at least in part, on whether an educational institution seeking to impart religious values decides to accomplish that "delicately or indirectly" or through the hard sell. But that is both a spiritual and educational determination that should be left to the school itself. The Ninth Circuit's interpretation of section 702 would inhibit a private school from utilizing the most important factor in creating a religiously based environment in an educational institution—that being a religiously based selection of faculty.

The Ninth Circuit recognized that religious instruction at Kamehameha Schools was provided by religious education teachers from kindergarten through the sixth grade. *Kamehameha*, 990 F.2d at 463; App. 10a-11a. It stated:

> The present teacher describes her work as "an important opportunity to expose children to the Christian faith. The emphasis is not on any 'religion' but to teach the basic truths about how God and through his son Jesus Christ teaches us how to live a joyous and fulfilling life."

*Id.* at 11a. The court of appeals also noted that all boarding students were required to attend Sunday services at the Bishop Memorial Church. *Kamehameha*, 990 F.2d at 462; App. 10a. The fact that the Kamehameha Schools decided to provide religious education to its students "delicately and indirectly" should not prevent it from providing an educational program consistent with its religious views.[3]

This Court last decided a case involving section 702's religious exemption in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In that case, this Court rejected an Establishment Clause attack on the statutory exemption provision. Professor Laurence Tribe discussed this Court's decision in *Amos* and compared it with this Court's decision in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), which found a state Sabbath accommodation exemption to be unconstitutional. Professor Tribe noted that in *Amos* the section 702 exemption "reduces regulatory entanglement between church and state." L. Tribe, *American Constitutional Law* 1198 (2d ed. 1988). He further said:

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[3] The district court in its decision, finding that Kamehameha Schools were entitled to a section 702 exemption, observed:

> Indeed, the President of Kamehameha Schools averred that the "daily contact with Protestant role models, prayer before meals, devotionals, required religious courses, the Bishop Memorial Church and chapel on campus, religious programs of the school, deputation teams, and religious extra-curricular activities all speak to the degree to which religion plays a role at Kamehameha." Affidavit of Michael Chun, President of Kamehameha Schools.

App. 37a-38a.

> The *Amos* majority noted that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." In that respect, as Justice O'Connor noted, government is lifting two separate burdens from religion: the burden of Title VII's requirements, and the burden of having to demonstrate that a given activity is religious. Whereas the *Amos* statute sought to reduce the entanglement between a religious community and the government, by minimizing the occasions for government scrutiny of the community's activities, the *Thornton* statute could claim no such justification. . . .

*Id.* It is exactly this concern which Professor Tribe observed—that is the chilling effect visited on a religious organization having to predict which of its activities a secular court will consider religious—which amici claim requires a broad interpretation of the section 702 exemption.

Professor Donald Giannella has observed that a determination of the degree of religiosity found in an elementary or secondary school would involve the judiciary in the kind of entanglement which this Court has been trying to avoid in First Amendment cases. Professor Giannella also stated that if a highly refined and particularistic test were adopted by the Court with reference to the religiosity of the schools, some schools would inevitably register plausible complaints of invidious discrimination or lack of equal treatment. Giannella suggests that when judicial decisions turn on such "elusive" and "ephemeral" matters concern-

ing religion, entanglement becomes excessive, and equal treatment of religion in schools is seriously endangered. Giannella, *Lemon and Tilton: The Bitter and the Sweet of the Church-State Entanglement*, 1971 Sup. Ct. Rev. 147, 181.

As the district court noted, Kamehameha Schools have a curriculum directed toward the propagation of the Protestant religion. It requires Sunday church attendance for boarders and weekly chapel attendance for all students. It requires prayer before all meals and school events and has required religious education for 104 years. Certain of Kamehameha's courses are taught by either Christian education teachers or ordained Protestant ministers. School publications contain religiously-oriented material, and the schools themselves encourage and sponsor participation by students in religious organizations. App. 40a at n.6. If direct governmental aid were to be funneled to Kamehameha, it would be struck down as unconstitutional under *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); and *Aguilar v. Felton*, 473 U.S. 402 (1985).[4]

In *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977), the court observed that "an even-handed approach to justice might seem to suggest that the Religion Clauses, serving as they do as a buckler to stop financial aid to these schools

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[4] The Bishop Memorial Church is attended by Kamehameha students and is located on the school campus. App. 37a, 40a at n.6. The church building and its services on campus stand as an ongoing symbol of the religious character of the educational institution and add to the school's religious atmosphere. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390-91 (1985).

should not now be any less effective to ward off the inhibiting effect of the governmental regulations here involved." If Kamehameha Schools are prohibited from receiving direct government grants because of their religious atmosphere and conduct within the schools, the government should be barred from imposing itself into school staffing and dismissal matters.

Section 702 lifts from "a religious corporation, association, educational institution, or society" a governmentally imposed burden relative to employee selection. A narrow interpretation of section 702 tends toward selectivity in drawing fine lines between those institutions that fall within and those outside of the exemption. *See* L. Tribe, *American Constitutional Law* 1200-01 (2d ed. 1988).

A narrow interpretation of section 702 also results in practical problems affecting organizations such as the amici here which are not church organizations but which nevertheless operate educational institutions with a religious perspective and have throughout their history selected faculty and staff who reflect their sectarian views. But with a narrow interpretation of section 702 and a case-by-case evaluation by EEOC, any non-church operated school has the potential of being the target of a discrimination claim when, in the carrying out of its mission, it selects teachers and staff with a sectarian view. The hundreds of organizations operating educational institutions espousing religious viewpoints but including religion in their operations in a variety of ways, some to a greater and some to a lesser extent, impels resolution by this Court of the section's interpretation. This is especially true when, as noted in petitioner's brief, there is a

split in the circuits relative to whether the exemption should be narrowly or broadly construed.

## CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted, and the judgment of the court of appeals should be reversed.

Dated: October 15, 1993 Respectfully submitted,

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